

**BEFORE THE DEPARTMENT OF WATER RESOURCES
OF THE STATE OF IDAHO**

IN THE MATTER OF APPLICATION)
FOR PERMIT OF WATER RIGHT NO.)
61-11954 IN THE NAME OF ROCKY)
MOUNTAIN LAND & CATTLE CO.)

PRELIMINARY ORDER

This matter having come before the Idaho Department of Water Resources ("IDWR") or ("Department") in the form of a protested application for permit to appropriate the public waters of the state of Idaho and the Department having held a conference and a hearing in the matter, the hearing officer, based upon his understanding of the law and the facts in this matter, makes the following Findings of Fact, Conclusions of Law and Preliminary Order:

STANDARD FOR DECISION

Water right applications are processed under Idaho Code § 42-203A which provides, in part, that:

(5) The director of the department of water resources shall find and determine from the evidence presented to what use or uses the water sought to be appropriated can be and are intended to be applied. In all applications whether protested or not protested, where the proposed use is such (a) that it will reduce the quantity of water under existing water rights, or (b) that the water supply itself is insufficient for the purpose for which it is sought to be appropriated, or (c) where it appears to the satisfaction of the director that such application is not made in good faith, is made for delay or speculative purposes, or (d) that the applicant has not sufficient financial resources with which to complete the work involved therein, or (e) that it will conflict with the local public interest, where the local public interest is defined as the affairs of the people in the area directly affected by the proposed use, or (f) that it is contrary to conservation of water resources within the state of Idaho; the director of the department of water resources may reject such application and refuse issuance of a permit therefore, or may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions.

A water right applicant bears the burden of proof for the factors the Director of the Idaho Department of Water Resources must consider under Section 42-203A, Idaho Code. *Cantlin v. Carter*, 88 Idaho 179, 187 (1964). Both the applicant and any protestants have the burden of coming forward with information concerning factors affecting the local public interest of which they can be expected to be more cognizant than the other parties. *Shokal v. Dunn*, 109 Idaho 330, 339 (1985). IDAPA 37.03.08.40.04 (Water Appropriation Rule 40.04)

The criteria for evaluating the factors listed above is described in IDAPA 37.03.08.45 (Water Appropriation Rule 45).

FINDINGS OF FACT

1. On December 12, 2001, Rocky Mountain Land & Cattle Co ("RML&C") or ("applicant") initiated Application for Permit No. **61-11954** ("application") which was finalized January 14, 2002 as follows:

Source:	Ground water
Use and rate of diversion:	0.27 cubic feet per second (cfs) for Heating 0.59 cfs for Commercial 3.30 cfs for Stockwater 0.08 cfs for Domestic
Total rate of diversion:	3.30 cfs
Points of diversion:	Three existing wells (2 six - inch diameter wells diverting from a cold water source and 1 six - inch diameter well diverting from a low-temperature geothermal source) located within the SW1/4NE1/4 Section 6, T5S, R11E, B.M. in Elmore County.

(Note: The "1/4" designations will be omitted from subsequent legal descriptions in this order).
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Season of use:	January 1 to December 31 for all uses
Place of use:	Heating NWSW S5; SWNE S6; all T5S, R11E. Commercial NESW, NWSW, SWSW, SESW S5; SWNE, SENE, NESE, NWSE, SWSE, SESE S6; NENE S7; NENW, NWNW S8; all T5S, R11E. Stockwater NESW, NWSW, SESW S5; SWNE, SENE, NESE S6; all T5S, R11E. Domestic SWNE S6, T5S, R11E.

Domestic use is for 3 homes; Commercial use is for 1 office, 1 shop, 1 feedmill, hose bibs at 2 live cattle processing facilities for miscellaneous use, 1 horse barn, dust abatement in corrals, and washing of ranch vehicles. Commercial place of use includes land application area for waste.

Remarks: Diversion from the existing well from the low-temperature geothermal source will not exceed 0.27 cfs.

2. The applicant, represented by Roger Ball, requested processing of the application agreeing to a potential condition of approval that would require mitigation should the Director of the Idaho Department of Water Resources determine that mitigation is necessary to offset depletions from the appropriation to flows in the Snake River during periods of anadromous fish migration.

3. The Department published notice of the application that was subsequently protested by the United States of America acting through the Bureau of Land Management ("BLM"), Debra and/or Von Bross, and the King Hill Domestic Water & Sewer Users Association ("KHDW"); referred to collectively herein as "protestants".

4. On April 17, 2002, the Department conducted a pre-hearing conference in the matter that did not resolve the protests. As a result of the conference the applicant amended the application to reflect the following requested rates of diversion:

Use and rate of diversion:	0.27 cfs for Heating
	0.59 cfs for Commercial
	0.84 cfs for Stockwater
	0.08 cfs for Domestic

The total rate of diversion was not specified.

5. On August 20, 2002, the Department conducted a pre-hearing conference and a formal hearing in the matter. All parties were present at the conference and hearing. The applicant was represented by attorney Kent W. Foster. KHDW was represented by attorney Richard A. Carlson. BLM was represented by Floyd P. DeWitt. Debra and Von Bross represented themselves.

6. At the pre-hearing conference the applicant amended the application deleting the NENW S8, T5S, R11E as a place of use for commercial use and clarified that the total rate of diversion sought is 1.78 cfs.

7. The NENW S8, T5S, R11E is owned by the United States of America under BLM control. Based on removal of those lands from the proposed place of use the BLM has withdrawn their protest.

8. The application proposes to divert water from within a portion of IDWR

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administrative basin 61, which is not subject to a moratorium on processing of applications for permit.

9. Exhibits premarked, offered or accepted as a part of the record are as follows:

APPLICANT'S:

Exhibit 1	Location Quad Map (Large) - Admitted
Exhibit 2	Aerial Photo of Pitchfork Ranch Area (Large) - Admitted
Exhibit 3	Well Data including Driller's Logs - Admitted
Exhibit 4	Well Pumping Test Report - Admitted
Exhibit 4A	RML&C Pump Test Chart (Large) - Admitted
Exhibit 4B	KHDW Pump Test Chart (Large) - Admitted
Exhibit 5	Well Interference Analysis - Admitted
Exhibit 6	Water Requirements - Admitted
Exhibit 7	Feedlot (Fly – Dust – Odor) Management Plan - Admitted

PROTESTANT'S

Exhibit A	NOT OFFERED
Exhibit B	Location Quad Map with colored notations (Large) - Admitted
Exhibit C	Color Photos (3 sheets 8 photos total) - Admitted
Exhibit D	IDWR Ground Water Vulnerability Map - Admitted
Exhibit E	Letter to Merritt from King Hill Residents dated 8/12/2002 - Admitted
Exhibit F	Letter to Merritt from Heath dated 8/12/2002 - Admitted
Exhibit G	Letter to Merritt from Carnahan dated 8/12/2002 - Admitted
Exhibit H	Letter to Merritt from Duerig dated 8/12/2002 - Admitted
Exhibit I	NOT OFFERED
Exhibit J	Well Logs - Admitted
Exhibit K	Proposed Odor Rules and IDH&W information - Admitted
Exhibit L	NOT OFFERED
Exhibit M	NOT OFFERED
Exhibit N	Glenns Ferry Wind Data - Admitted
Exhibit O	NOT OFFERED
Exhibit P	NOT OFFERED
Exhibit Q	Water Use Analysis - Offered but NOT ADMITTED
Exhibit R	IDWR Water Right Profile Report for 61-02242 - Admitted
Exhibit S	King Hill Census Data (3 pages) - Admitted
Exhibit T	NOT OFFERED
Exhibit U	NOT OFFERED
Exhibit V	Letter to Hawkins from Elmore County P&Z dated 3/26/2002 - Admitted

10. At the hearing the following individuals testified on behalf of the Applicant:
 - a. Hal Hawkins, CEO of RML&C LLC
 - b. Robert Kellogg, RML&C King Hill feedlot manager
 - c. Dr. Charles E. Brockway, Brockway Engineering PLLC, engineer, hydrologist, consultant

11. At the hearing the following individuals testified in opposition to the application:
 - a. Harry Knox, past owner of ranch and local resident.
 - b. Melinda Harper, geologist, consultant
 - c. Deborah Soggs, local resident, postmaster of King Hill
 - d. Knight C. Duerig, local resident, chairman KHDW
 - e. Von Bross, local resident, protestant
 - f. Debra Bross, local resident, protestant

12. The applicant owns decreed water right 61-10120 recorded as follows for use at the ranch:

Current Owner:	Barber-Caven Ranches Pitch Fork Ranch 6874 Fairview Rd Boise, ID 83704
Priority:	03/01/1900
Source:	Ground water
Use and rate of diversion:	0.06 cfs for Stockwater 0.02 cfs for Domestic
Total rate of diversion:	0.08 cfs
Season of use:	January 1 to December 31 for all uses
Point of diversion:	SWSWNE S6, T5S, R11E., Elmore County
Place of use:	Stockwater NESW S6, T5S, R11E. Domestic NESW S6, T5S, R11E.
Conditions:	-The quantity of water decreed for this water right is not a determination of historical beneficial use. -The quantity of water under this right shall not exceed 13,000 gallons per day.

13. The purpose of the application 61-11954 is to provide a water right for existing development beyond that covered by right 61-10120 as well as provide a water right for future uses associated with expansion of an existing feedlot to up to 15,000 head and heating of existing homes and utility buildings.

14. The applicant (RML&C) is a Limited Liability Company (LLC) and is a subsidiary of Ball Management with Roger Ball as principal owner.

15. The owner of RML&C has sufficient financial resources for development of the proposed water use. (Portion of development already exists; sworn testimony of Hal Hawkins not rebutted by protestants.)

16. The applicant has prepared a nutrient management plan to be filed with the Idaho Department of Agriculture for disposal of waste from the proposed expanded Confined Animal Feeding Operation ("CAFO").

17. The applicant has prepared a feedlot fly-odor-dust management plan to be filed with the Idaho Department of Agriculture for the proposed expanded CAFO.

18. The applicant is investigating moving the primary access road to the CAFO from the roadway through King Hill to a roadway east of King Hill accessing BLM lands.

19. The applicant has filed for a confined animal feeding operation (CAFO) permit for 15,000 head and a "Request for Variance" with Elmore County. The county has denied the "Request for Variance" based on public interest considerations. Approval of the CAFO permit cannot occur without changing the existing county ordinance.

20. The applicant has a "grandfathered" confined animal feeding operation (CAFO) facility of 2,800 head existing at the site authorized by Elmore County. [2,800 head is equivalent to 1,680 animal units (AU) by Elmore County definition where an AU is 0.6 for steers/cows weighing 600 –1,000 lbs. 2,800 head is equivalent to 2,413.6 AU as defined by Idaho State Department of Agriculture where an AU is based on a 1,000 lbs. steer/cow and the average weight per head is 862 lbs.]

21. The existing facility provides employment to the local area and would provide additional jobs at a rate of approximately 1 job per additional 1000 head of livestock.

22. The existing CAFO facility utilizes hay and silage grown on the ranch property with some importation of grain from fields not owned by the applicant. Expansion of the CAFO would require an increased importation of silage and grain.

23. The existing CAFO facility utilizes the manure generated from the CAFO to fertilize cropped land on the ranch property. Expansion of the CAFO would require exportation of manure from the ranch to lands not owned by the applicant.

24. Expansion of the CAFO will significantly increase the traffic of large trucks to and from the ranch and CAFO facility.

25. The nearest production well outside of the ranch property boundary is located approximately 5500 feet southwest of the proposed points of diversion.

26. The applicant has conducted a well interference study. The study involved pumping an irrigation well located approximately 700 feet from the proposed points of diversion. The study concluded the irrigation well could sustain 450 to 500 gpm without modification. The study predicted if the irrigation well was pumped it would slightly impact the proposed points of diversion but would not impact existing wells further away.

27. Using a computer program, the applicant has analyzed drawdown for the general area around the proposed points of diversion. The drawdown analysis incorporates results of the well test and review of well logs from the area. One computer run or calculation was based on diversion of 0.30 cfs continuously pumped for 80 days. (The 0.30 cfs used in the program, although it is less than the requested rate of the application, if continuously pumped, would divert a volume of 217 acre-feet in a year which approximates the annual volume of the application assuming the water used for heating is re-used.) The 0.30 cfs after 80 days would have diverted 47.6 acre-feet. The model predicts after 80 days that the aquifer drawdown at 1,000 feet would be 1.22 feet. At 2,640 feet (1/2 mile) the drawdown would be 0.04 feet and at 5,280 feet (1 mile) the drawdown would be 0.00 feet or less than precision of reporting. At the general site of the proposed points of diversion the drawdown is predicted to be in the range of 7 to 8 feet. The predictions are linear with respect to diversion rate.

28. Department's standard rate for stockwater for beef cattle or horses is 0.00022 cfs per head.

29. The applicant currently waters cattle in troughs equipped with flow control floats. The applicant proposes only to divert water necessary for beneficial use. It is the intention of the applicant that water diverted for heating of homes will be used for cattle watering or other beneficial uses.

30. The applicant's expert witness, Dr. Brockway, testified that the proposed points of diversion or wells of RML&C are associated with the same aquifer as the KHDW wells; that the Bross well is likely associated with the same aquifer; and that the hot water wells in the Glenn's Ferry area south of the Snake River are likely not associated with the same aquifer as those of RML&C.

31. The protestant's and local residents concerns regarding the application include:

- a. The CAFO will decrease the quality of life in the local area and is a health hazard due to odor and flies for the area.
- b. The CAFO creates a traffic hazard and nuisance due to trucks passing through the residential portion of King Hill.
- c. The animal waste, dead animals and other potential pollutants from the CAFO will contaminate the aquifer and local streams and poses a health risk.
- d. The increased use of water on the ranch will decrease production of existing wells surrounding the ranch.
- e. The expansion of the CAFO will have a negative economic impact on the infrastructure of the local community and will negatively affect the local land prices.

32. The record is not clear as to the diameter of the two cold water wells proposed as points of diversion. (6" or 8" in diameter)

DISPOSITION OF MOTION TO DISMISS

During the hearing held August 20, 2002, after the applicant's presentation, KHWD's attorney moved that the application be rejected based on failure of the applicant to meet its burden to show that the water supply itself is sufficient for the purpose for which it is sought to be appropriated. The hearing officer understands the theory of the motion to be:

- a. The existing cold water wells are 6 inches in diameter.
- b. Six - inch diameter wells limit pump size.
- c. Estimated individual well capacity with limited pump size would be 0.31 cfs.
- d. Total estimated capacity of three existing wells is limited to 0.89 cfs.
- e. Since 0.89 cfs is less than 1.78 cfs application should be rejected.

The applicant objected to this motion. The hearing officer took this motion under advisement.

The hearing officer now **denies** this motion based on his understanding that:

- a. The term "water supply" as used in Idaho Code § 42-203A in this instance is the ground water source rather than the diversion facilities.
- b. Pursuant to Idaho Code § 42-203A the director of the department of water resources may reject an application and refuse issuance of a permit, or

may partially approve and grant a permit for a smaller quantity of water than applied for, or may grant a permit upon conditions. (emphasis added)

c. Traditionally, the descriptions of diversion works listed on applications for permit have not been limiting factors for issuance of the permit. The descriptive information has been generally used as reference information.

d. See Findings 32 above.

e. The applicant's attorney at the hearing clarified that the existing wells may be modified to effectively divert permitted amounts, if necessary.

CONCLUSIONS OF LAW

1. Conservation of Water The applicant has satisfied its burden of persuasion by demonstrating that the proposed use is consistent with the conservation of water within the state of Idaho. The applicant currently has installed water management equipment on troughs and intends to recycle water used for heating for other beneficial uses.

2. Financial Resources The applicant has satisfied its burden of persuasion by demonstrating that it has sufficient financial resources with which to complete the work involved. A portion of the proposed facilities of the ranch intended to be covered under the water right already exist.

3. Injury to Water Rights The applicant has satisfied its burden of persuasion by demonstrating that the proposed use will not reduce the quantity of water under existing water rights. The applicant has demonstrated by expert opinion and by computer analysis that the application if approved will not drawdown the aquifer at the site of existing wells outside the RML&C boundary. The protestant presented critique of the well study conducted but did not present other calculations of drawdown or further analysis.

4. Sufficiency of Water Supply The applicant has satisfied its burden of persuasion by demonstrating that the water supply itself is sufficient for the purpose for which it is sought to be appropriated. The applicant has conducted pump tests on a nearby irrigation well demonstrating that ground water is found in sufficient quantities in the area of the proposed diversions. (See above "Disposition of Motion to Dismiss")

5. Application Made in Good Faith The applicant has satisfied its burden of persuasion by demonstrating that the application is made in good faith by obtaining a CAFO permit and by seeking other approvals needed for a portion of the proposed project. The applicant has not received needed approvals for the expansion of the CAFO and for this portion of the project the application is deemed to be speculative in nature.

6. Local Public Interest The applicant has satisfied its burden of persuasion by demonstrating that the purpose for which it is sought to be appropriated,

excluding expansion of the authorized CAFO, is in the local public interest, where the local public interest is defined as the affairs of the people in the area directly affected by the proposal. A major portion of the uses sought to be covered by the application are historically acceptable and existing uses that with proper management should not be disrupted. The applicant has demonstrated it is desirous and capable of properly managing uses that are consistent with local public interest.

7. Summary The record supports issuance of a permit to provide an adequate water supply for the authorize CAFO and other associated facilities having county approval, but the applicant has not satisfied its burden of persuasion by providing evidence that the proposed expansion of the existing CAFO is in the local public interest. The protestants have demonstrated that the expansion of the authorized CAFO is speculative in nature since expansion of the CAFO would require a permit from Elmore County which cannot be issued without a change in existing county ordinances. The protestants have also demonstrated that expansion of the CAFO presents a traffic hazard and nuisance to the residents of the city of King Hill and that a prior decision of the county has denied a CAFO permit for the expansion based on “public interest”. The Department should approve the application in part to provide an adequate water supply for the authorized CAFO and deny that portion of the application for expansion of the CAFO to prevent diversion and use of water for the expansion of the CAFO.

ORDER

IT IS THEREFORE, hereby ORDERED that Application for Permit 61-11954 is **APPROVED**, in part, with certain conditions to protect the public interest and conservation of water resources within the state of Idaho as described on the following draft permit:

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State of Idaho

Department of Water Resources

DRAFT*** Permit to Appropriate Water

*****Authority to divert water is not authorized until this preliminary order becomes final.**

This permit is issued pursuant to the provisions of Section 42-204, Idaho Code.

NO. 61-11954

Priority: December 12, 2001

Maximum Diversion Rate: 1.29 CFS

This is to certify, that **ROCKY MOUNTAIN LAND & CATTLE CO**
PO BOX 1491
IDAHO FALLS ID 83404

has applied for a permit to appropriate water from:

Source: GROUND WATER

and a permit is APPROVED for development of water as follows:

<u>BENEFICIAL USE</u>	<u>PERIOD OF USE</u>	<u>RATE OF DIVERSION</u>	<u>ANNUAL VOLUME</u>
COMMERCIAL	01/01 to 12/31	0.59 CFS	
STOCKWATER	01/01 to 12/31	0.62 CFS	
DOMESTIC	01/01 to 12/31	0.08 CFS	
HEATING	01/01 to 12/31	0.27 CFS	

LOCATION OF POINT(S) OF DIVERSION:

GROUND WATER	SW1/4NE1/4	Sec. 6, Twp 05S, Rge 11E, B.M.
ELMORE County		
GROUND WATER	SW1/4NE1/4	Sec. 6, Twp 05S, Rge 11E, B.M.
ELMORE County		
GROUND WATER	SW1/4NE1/4	Sec. 6, Twp 05S, Rge 11E, B.M.
ELMORE County		

PLACE OF USE: COMMERCIAL

TwpRgeSec	NE				NW				SW				SE				Totals
	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
05S11E 5									X	X	X	X					
05S11E 6			X	X									X	X	X	X	
05S11E 7	X																
05S11E 8					X												

PLACE OF USE: STOCKWATER

TwpRgeSec	NE				NW				SW				SE				Totals
	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
05S11E 5									X	X		X					
05S11E 6			X	X									X				

PLACE OF USE: DOMESTIC

TwpRgeSec	NE				NW				SW				SE				Totals
	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
05S11E 6			X														

PLACE OF USE: HEATING

TwpRgeSec	NE				NW				SW				SE				Totals
	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	NE	NW	SW	SE	
05S11E 6			X														

CONDITIONS OF APPROVAL

1. Proof of application of water to beneficial use shall be submitted on or before *(The proof due date will be added when the permit is issued after this preliminary order becomes final and will be 2 years from the date the permit is issued.)*
2. Subject to all prior water rights.
3. Right holder shall comply with the drilling permit requirements of Section 42-235, Idaho Code to modify any of the existing authorized points of diversion.
4. Stockwater use is for a maximum of 2,800 head of cattle and 30 horses.
5. Domestic use is for 3 homes.
6. The domestic use authorized under this right shall not exceed 13,000 gallons per day per home.
7. The irrigation occurring under this domestic use shall not exceed 1/2 acre for each home.
8. This right when combined with 61-10120 shall provide for no more than 3 homes and 2,800 head of beef cattle and when combined shall not exceed a total diversion rate of 1.29 cfs.
9. Commercial use includes water used in restrooms in shop, feed mill and offices. Commercial use also includes washing vehicles and equipment, water for feed preparation, dust control in corrals.
10. The place of commercial use authorized by this approval includes land upon which wastewater from the CAFO may be applied for irrigation purposes to satisfy water quality requirements. Water diverted under this approval shall not be used for irrigation unless the water is first used in the CAFO as authorized by this water right.
11. Heating use is for heating of 3 homes, and 2 office spaces. Low-temperature geothermal water diverted under this right shall be first used for heat value. Heating use of water under this right shall be non-consumptive to the extent that after the heat value is used the water may then be used for other beneficial uses identified under this right or other beneficial uses authorized under other water rights. Any water diverted not beneficially used shall be injected back to the aquifer. If waste water from heating is injected back to the aquifer, the injection system must be authorized by a separate injection well permit. Use of the low-temperature geothermal well is limited to no more than 0.27 cfs.
12. The right holder shall maintain a totalizing measuring device of a type approved by the Department as a part of the diverting works on all wells.
13. Use of water under this approval shall comply with applicable water quality standards of the Department of Environmental Quality.
14. The Director retains jurisdiction to require the right holder to provide purchased or leased natural flow or stored water to offset depletion of Lower Snake River flows if needed for salmon migration purposes. The amount of water required to be released into the Snake River or a tributary, if needed for this purpose, will be determined by the Director based upon the reduction in flow caused by the use of water pursuant to this permit.
15. In accordance with applicable law, the right holder is responsible to ensure that pumpage under this approval does not reduce the water available under any prior right so as to cause material injury to the holder of the prior right as determined by the Director, unless the right holder provides compensation or mitigation to the prior right holder.

This permit is issued pursuant to the provisions of Section 42-204, Idaho Code. Witness the signature of

[illegible]

_____/Signed/_____
ALLEN D. MERRITT, P.E.
Hearing Officer